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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. BRETT STEPHEN AMSBAUGH and NASSER CASTELLANOS RODRIGUEZ, Defendants and Appellants.	G045435 (consol. with G045463) (Super. Ct. No. 09SF0394) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, William R. Froeberg, Judge. Affirmed.

Ellen M. Matsumoto, under appointment by the Court of Appeal, for Defendant and Appellant Amsbaugh.

Sharon M. Jones, under appointment by the Court of Appeal, for Defendant and Appellant Rodriguez.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Scott C. Taylor and Marissa Bejarano, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted Brett Stephen Amsbaugh and Nasser Castellanos Rodriguez of two counts each of attempted premeditated murder (Pen. Code, §§ 187, subd. (a), 189, 664, subd. (a); all further statutory references are to this code), two counts each of aggravated assault with a deadly weapon (§ 245, subd. (a)(1)), and active participation in a criminal street gang (§ 186.22, subd. (a)). The jury also found several enhancement allegations true, including that the offenses were gang related (§ 186.22, subd. (b)), and Amsbaugh inflicted great bodily injury(§ 12022.7, subd. (a)) on one victim and Rodriguez on the other. After the jury reached its verdict, Amsbaugh admitted a prior prison term allegation, Rodriguez admitted prior serious felony and strike allegations, and the trial court imposed sentences of 34 years to life on Amsbaugh and, based on Rodriguez's prior strike, 68 years to life on Rodriguez.

Defendants challenge the sufficiency of the evidence to support the jury's conclusion they premeditated the attempted murders. They also argue the trial court erroneously failed to include a jury instruction stating it must be objectively foreseeable a coperpetrator might commit an attempted murder in a deliberate and premeditated fashion before accomplice liability attaches under the natural and probable consequences doctrine. Our Supreme Court has rejected the latter contention and, as we explain, substantial evidence supports the jury's conclusion defendants committed the attempted murders with premeditation and deliberation. We therefore affirm the judgment.

I

FACTUAL AND PROCEDURAL BACKGROUND

Around 8:00 p.m. on April 9, 2009, Amsbaugh and Rodriguez, both active members of the "Varrio Chico" criminal street gang, drove in a black truck with dark tinted windows slowly down Paseo Carolina in San Juan Capistrano, in territory claimed by a rival gang, "Varrio Viejo." As they passed a group of individuals from the neighborhood, including Mario Rodriguez Avalos and Ramon Rodriguez,[1] Amsbaugh "mad dogged" the young men and a female companion through the open passenger window with an"angr[y]" and "intimidating" gaze. Ramon later admitted he "grew up with Varrio Viejo since the age of 12," but denied current affiliation or membership. Those present in Ramon's group suspected Amsbaugh's "bad stare" portended "trouble," according to gangland mores. Rodriguez and Amsbaugh continued to slowly motor past the group, traveled to the end of the block, made a U-turn in a cul-de-sac, returned and came to a stop where Mario and Ramon stood. Someone yelled from the car something like, "Where are you from?" and "Varrio Chico," which Ramon and Mario's female acquaintance knew meant still more "trouble," which followed quickly when Amsbaugh and Rodriguez exited their vehicle and began assaulting Mario and Ramon.

Amsbaugh attacked Mario, punching and kicking him in the stomach and chest. Mario tried to defend himself, striking Amsbaugh in the face. But he fell to the ground, and Amsbaugh stabbed him at least three times in the upper portion of his back, collapsing both lungs.

Meanwhile, Rodriguez attacked Ramon, punching and kicking him. Ramon punched back and threw his skateboard at Rodriguez, but missed. He fell to the

[1] Given the common Rodriguez surname shared by the victims and a defendant, we use Mario's and Ramon's first names for clarity, and intend no disrespect.

ground and curled up in the fetal position, covering his face with his arms while Rodriguez continued to beat him. After the fighting concluded, Ramon stood up, realized he had been stabbed , and fell back to the ground. He sustained four stab wounds on his back, a collapsed lung, fractured ribs, and another stab wound on his right arm.

The fighting lasted approximately three minutes before Amsbaugh and Rodriguez stabbed their fallen victims, climbed back in their truck, and sped away. Detectives later apprehended Amsbaugh and Rodriguez, and testing revealed Ramon's DNA in a stain on Amsbaugh's shoe.

II

DISCUSSION

A. *Substantial Evidence Supports the Jury's Verdict*

Defendants challenge the sufficiency of the evidence to support the jury's conclusion they committed the attempted murders in a deliberate, premeditated fashion. On appeal, we must view the record in the light most favorable to the judgment below. (*People v. Elliot* (2005) 37 Cal.4th 453, 466.) The test is whether substantial evidence supports the verdict (*People v. Johnson* (1980) 26 Cal.3d 557, 577), not whether the appellate panel is persuaded the defendant is guilty beyond a reasonable doubt. (*People v. Crittenden* (1994) 9 Cal.4th 83, 139.) It is the jury's exclusive province to weigh the evidence, assess the credibility of the witnesses, and resolve conflicts in the testimony. (*People v. Sanchez* (2003) 113 Cal.App.4th 325, 330.) Accordingly, we must presume in support of the judgment the existence of facts reasonably drawn by inference from the evidence. (*Crittenden*, at p. 139; see *People v. Stanley* (1995) 10 Cal.4th 764, 792 [same deferential standard of review applies to circumstantial evidence].) The fact that circumstances can be reconciled with a contrary finding does not warrant reversal of the

judgment. (*People v. Bean* (1988) 46 Cal.3d 919, 932–933 (*Bean*).) Consequently, an appellant "bears an enormous burden" in challenging the sufficiency of the evidence. (*Sanchez,* at p. 330.)

Defendants contend the evidence showed only a "rash, spontaneous attack upon the two victims," not the necessary deliberation and premeditation to support the verdict. "Deliberation" refers to the actor carefully weighing considerations in forming a course of action; "premeditation" means the actor thought over those considerations in advance. (*People v. Halvorsen* (2007) 42 Cal.4th 379, 419.)

The Supreme Court has explained generally that evidence sufficient to "sustain a finding of premeditation and deliberation falls into three basic categories: (1) facts about how and what defendant did *prior* to the actual killing which show that the defendant was engaged in activity directed toward, and explicable as intended to result in, the killing — what may be characterized as 'planning' activity; (2) facts about the defendant's *prior* relationship and/or conduct with the victim from which the jury could reasonably infer a 'motive' to kill the victim, which inference of motive, together with facts of type (1) or (3), would in turn support an inference that the killing was the result of 'a pre-existing reflection' and 'careful thought and weighing of considerations' rather than 'mere unconsidered or rash impulse hastily executed' [citation]; [and] (3) facts about the nature of the killing from which the jury could infer that the *manner* of killing was so particular and exacting that the defendant must have intentionally killed according to a 'preconceived design' to take his victim's life in a particular way for a 'reason' which the jury can reasonably infer from facts of type (1) or (2)." (*People v. Anderson* (1968) 70 Cal.2d 15, 26-27 (*Anderson*).)

Defendants argue under these factors that there was little evidence of planning, no "prior relationship" motive evidence other than a general gang rivalry instead of a recent incident requiring retaliation under gang mores, and nothing in the manner of the attempted knifings to suggest premeditation and deliberation. The *Anderson* factors, however, are disjunctive, not exhaustive or exclusive; they need not be present in any particular combination, nor does any single factor carry definitive weight. (*People v. Pride* (1992) 3 Cal.4th 195, 247; see, e.g., *People v. Carasi* (2008) 44 Cal.4th 1263, 1306 [listing *Anderson* factors in disjunctive]; *People v. Romero* (2008) 44 Cal.4th 386, 401 [same]; *People v. Nazeri* (2010) 187 Cal.App.4th 1101, 1113 [same].) The issue on appeal is simply whether a jury reasonably could determine an attempted killing resulted from preexisting reflection, rather than an unconsidered and rash impulse. (*People v. Hughes* (2002) 27 Cal.4th 287, 342.) While defendants minimize the evidence of premeditation and deliberation, the standard of review is to the contrary, as noted.

Defendants do not address, for example, the U-turn they made showing ample time for premeditation and deliberation. "'The process of premeditation and deliberation does not require any extended period of time. "The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly. . . ." [Citations.]' [Citation.]" (*People v. Koontz* (2002) 27 Cal.4th 1041, 1080).) Far from a rash or spontaneous encounter as defendants assert, the jury reasonably could discern in defendants' actions the requisite deliberation and premeditation: they armed themselves for a foray into rival gang territory, located and "mad dogged" their prey in a threatening manner, chose not to break off the impending confrontation, but instead made a U-turn to embrace it, and invoked their gang name in setting upon and then stabbing their victims

multiple times in the back when they fell to the ground. In particular, the jury reasonably could view defendants' stabbing of defenseless, prone victims as evidence they intended from the outset to attempt to kill their presumed rivals and not merely engage them in a fight, as they now claim. In any event, the fact the circumstances may be reconciled with a contrary conclusion does not aid defendants. (*Bean*, *supra*, 46 Cal.3d at pp. 932-933.) Ample evidence supports the jury's verdict.

B. *No Instructional Error under Controlling Precedent*

Relying on *People v. Hart* (2009) 176 Cal.App.4th 662, defendants argue the trial court erred by failing to instruct the jury on the intersection of the natural and probable consequences doctrine and attempted premeditated murder, specifically that a coperpetrator's *premeditated* murder attempt must be foreseeable for accomplice liability to apply under the natural and probable consequences doctrine. Defendants argue that the second attempted premeditated murder conviction each suffered as a result of the other's stabbing of a victim must be reversed absent an instruction that the coperpetrator's premeditation must have been objectively foreseeable. Over the dissent of two justices, however, the Supreme Court has concluded no such instruction is required for accomplice liability under the natural and probable consequences doctrine because it is sufficient that "the murder attempted *was* deliberate and premeditated . . . ." (*People v. Favor* (2012) 54 Cal.4th 868, 879, italics added.) The high court expressly overruled *Hart*. (*Id.* at p. 879, fn. 3.) We are bound by the Supreme Court's determination (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455), and consequently defendants' challenge fails.

III

DISPOSITION

The judgment is affirmed.

ARONSON, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

FYBEL, J.